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Supreme Court of the United States

OCTOBER TERM, 1934.

No. 648.

HAROLD E. WEST, J. FRANK HARPER AND STEUART PURCELL, THE PERSONS CONSTITUTING THE PUBLIC SERVICE COMMISSION OF MARYLAND, APPELLANTS,

versus

THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY OF BALTIMORE CITY, A CORPORATION, APPELLEE.

BRIEF OF THE RETAIL MERCHANTS ASSOCIATION OF BALTIMORE, MARYLAND, AS AMICUS CURIAE.

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The Daily Record Co. Print, Baltimore.

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Interest of The Retail Merchants Association of Baltimore, Maryland, on its own behalf and through its Members, Retail Merchants of Baltimore, Maryland.

The Retail Merchants Association of Baltimore embraces in its membership the leading department, furniture, men's, women's apparel, shoe, drug, jewelry and stationery stores of that city. Naturally these stores are very large users of the telephone service.

STATEMENT.

As the Commission says in its opinion (Record, Vol. 1, Page 14) the proceeding out of which this litigation arises

> "grew out of a conviction on the part of the Commission that, in view of the general decline in values of all property, the public was entitled to a reduction in the rates charged by utilities generally and that such reductions should be based on the value of utility properties at present-day prices. Acting on this conviction, the Commission, when it became convinced that the lower level of prices was not merely temporary, but that, to use the words of Chief Justice Hughes of the United States Supreme Court in the opinion of the Los Angeles case, we were 'upon a changed economic level', began discussions with utility managers throughout the State looking to a lowering of their charges".

When, consequent upon failure of the Commission to effect any reduction in charges, by agreement, it ordered a formal hearing, the Retail Merchants Association intervened in the proceeding and through its Counsel actively participated in the hearings. See the opinion (Record, Vol. 1, Page 14).

When the attack on the Commission's order was made in the Statutory Court, the Retail Merchants Association again obtained leave to intervene and continued throughout the Court proceedings its support of the Commission's action. The adverse ruling of the Court disappointed the hopes of relief which the Association had looked for from the Commission's action, and while not a formal party to this appeal, the members of the Association have a very keen and direct interest in the outcome of the case. Hence, with permission of this Court,

the Association respectfully submits, as "amicus curiae", this brief as supplementary to and in support of, that filed by the Commission.

The Commission's brief will cover in detail the salient facts and points, and it of course, is not intended to duplicate what is therein said. Probably anything at all supplementary to the Commission's brief must be in the nature of repetition, but in view of its great interest in the outcome of the litigation the Association ventures, as a matter of emphasis rather than as advancing any new or additional contentions or points of view, to submit certain considerations which to its members seem largely controlling, quite apart from the strictly technical issues in controversy.

ARGUMENT.

POINT 1. IN VIEW OF THE CHARACTER OF THE HEARING IN THIS INSTANCE, EVEN MORE THAN THE USUAL PRESUMPTION EXISTS IN FAVOR OF THE FAIRNESS, CORRECTNESS AND JUSTICE OF THE CONCLUSION REACHED BY THE COMMISSION.

Even the Telephone Company will, we are sure, agree that the three members of the Public Service Commission of Maryland who presided at this hearing and reached the conclusion now under review, are men of long experience, intelligence, character, and sense of fairness. The Maryland Public Service Commission has, it can be justly claimed, always been distinguished for its conservatism, and has never been charged with yielding to mere popular clamor, or with losing sight of the fact that its duties include protection to the utilities subject to its control no less than to the public served by these utilities. The remarkable prosperity of the Telephone Company

under the Commission's regulation since 1910 is evidence of its attitude in this regard. At this hearing the most complete and painstaking consideration was given by the Commission to every possible aspect of the case. No limitation or restriction of any kind either as to time or as to the nature of evidence was placed upon the Company. Every phase of the case was most thoroughly and exhaustively presented before the Commission, by testimony, exhibits and argument. Testimony was taken on thirty-six days, the record of the same covering six thousand four hundred and sixty-four typewritten pages; 133 exhibits were filed, 48 by counsel for the Company and 85 by People's Counsel, and five additional days were consumed in the arguments (Record, Vol. 1, Page 14).

The Commission, thereafter, rendered its opinion covering sixty-five printed pages. A perusal of this will indicate the great care and consideration given by the Commission to the several problems with which they had to deal, and upon which opinion its order of November 28th, 1933, directing the Company to file amended schedule of rates, is based, from which order the Company appealed to the Statutory Court.

In Darnell vs. Edwards, et al, 244 U. S. 564, at page 569, the Court said:

> "It is well established that in a question of rate-making there is a strong presumption in favor of the conclusions reached by an experienced administrative body after a full hearing."

This is especially applicable to the present case, as we have here an experienced and able Commission, and certainly forty-one days in presenting the case represents a full hearing.

Certainly the Company's economic and financial history, as disclosed in the Record and the Commission's brief, very convincingly indicates that it has consistently received entirely fair, liberal and just treatment at the hands of the Maryland Public Service Commission—a Commission which has uniformly commanded the respect and confidence not only of the people of the State, but of the many and varied utilities subject to its jurisdiction and control.

POINT 2. THE ISSUES INVOLVED IN THIS CONTROVERSY ARE PREEMINENTLY ISSUES OF FACT, AS TO WHICH THE CONCLUSIONS OF THE THREE MEMBERS OF THE COMMISSION ARE SUPPORTED BY EVIDENCE AND REASONING AT LEAST AS PERSUASIVE AS THOSE ASSIGNED BY THE THREE EMINENT MEMBERS OF THE STATUTORY COURT IN SUPPORT OF THEIR OWN CONCLUSIONS.

The Statutory Court did not find or hold that any fundamental principle of law had been violated or ignored by the Commission in arriving at its conclusion as to a "fair return" on the Company's investment. Even were that so, if the result was substantially correct, errors in the methods or reasoning by which that result was reached would not make the rates "confiscatory", or be ground for restraining enforcement of the Commission's order. It is respectfully submitted that the Court's findings constitute at most a difference of opinion with the Commission, and one not based as required by law, on compelling or coercive evidence presented by the Company. Dayton Power & Light Co. vs. Public Utilities Comm., 292 U. S. 290.

But at most, the differences between the Statutory Court and the Commission are as to conclusions drawn by them respectively, from the same facts and evidence,

and it is submitted that there is at least no such convincing and demonstrable error pointed out by the Court in the conclusions which the Commission drew from the facts, as to necessitate the disregard and overruling of findings, which, under the admitted law, are primarily entrusted to the decision of the Commission itself.

As pointed out in the Commission's brief, the actual return allowed by the Commission comes within only a few thousand dollars of the sum which even the Court holds would not be "confiscatory", and it is respectfully submitted that the very fact that the Court, arriving at its result by a different route, so closely approximates in actual result that arrived at by the Commission, of itself shows the difficulty, if not impossibility, of demonstrating (as the Company must do to sustain its complaint) that the conclusions of the Commission were "clearly erroneous".

POINT 3. DEPRECIATION EXPENSE.

The depreciation expense—the fund created by cash taken from payments made by the subscribers to maintain the Company's property unimpaired for the use of the public—is the item requiring special consideration in the present case, as it represents the only, it is submitted, really important difference between the Commission and the Court. It is necessitated to replace retirements of worn-out plant, occasioned by wear, tear, decay, inadequacy and obsolescence. The size of the fund needed for this purpose depends, of course, upon the extent to which the various factors mentioned above are operating at the time the determination is made.

One of the most important of the above factors is inadequacy, and witnesses for both the Company and Com-

mission agreed that due to loss of subscribers during the depression, inadequacy was not operating with its prior force, and that in fact there was at that time a substantial over-adequacy of plant and facilities. The Company claimed for depreciation expense in the present case $2,173,000 (Record, Vol. 2, Page 797) the Court allowed $2,000,000 (Record, Vol. 1, Page 578), and the Commission allowed $1,352,284 (Record, Vol 1, page 76), which under the existing conditions was very liberal. If the Commission's allowance had been in effect in 1933, for instance, the Company's depreciation reserve would still have increased by $400,000; that is, the Commission's allowance was that much greater than retirements during 1933. With the proper allowance for this item, a reduction in rates to the subscribers could be made without depriving the Company of a fair return.

CONCLUSION.

As heretofore said, it is not intended by this brief to cover the many technical points involved in this appeal. That will be most adequately done in the Commission's brief, and the close familiarity with these points resulting from the keen interest with which the Retail Merchants Association has followed the case justifies it in respectfully submitting that as to all these points the course adopted by the Commission is supported both by the weight of the evidence and by the well established legal principles applicable in such cases.

The Association again respectfully repeats that if the owners of the Telephone Company are by the new rates which the Commission has prescribed, still enabled to have assurance of a certain and safe return upon their entire investment, the mere fact that the rate of return

may be slightly reduced is not such a "confiscation" of their property as to entitle them to the enjoining by the Court of the order involved in this appeal.

It is, therefore, submitted that the decree of the District Court should be reversed.

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